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The role of law and legal knowledge for a transformative human rights education: addressing violations of children's rights in formal education

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The Role of Law and Legal Knowledge for a Transformative Human Rights Education: addressing violations of children's rights in formal education

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Keywords: Legal literacy; human rights literacy; children's rights education; critical human rights education; human rights violations; human rights practices

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Introduction

The United Nations Convention on the Rights of the Child ('the UNCRC' or 'the Convention') provides the most comprehensive statement of children's rights to, in and through education (Verhellen, 1993). Article 29, in particular, provides an unfailingly positive, aspirational vision of the education to which all children are entitled, one that enables them to develop to their fullest ability, learn respect for human rights, tolerance and acceptance of difference, and respect for the natural environment (Lundy et al, 2016). The UN Committee on the Rights of the Child ('the Committee') has said that Art. 29 of the Convention:

'... insists upon the need for education to be child-centred, child-friendly and empowering, and highlights the need for educational processes to be based upon the very principles it enunciates. The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values. The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence'. (UN, 2001, para. 2)

This image of positive, child-centred education could be lifted from numerous school mission statements, and many schools and teachers are committed to delivering an education that aims to provide something as close to this vision as possible. Human Rights Education (HRE) programmes and materials around the world also reinforce this educational vision by advocating it as a way to build a universal culture of respect for human rights, and to promote sustainable development and social justice (UN, 2005, p. 12).

However, there is also little question that in every single country, every single day, there are children whose educational experience falls far short of this internationally agreed blueprint. As an example, a case in South Africa was brought to court when approximately 3% of children in one province were not supplied with free school textbooks, unlike their more affluent, urban-dwelling peers. The inequality and discrimination that ensued, affecting a predominantly poor, rural and black community, was challenged by Better Education for All (BEFA), an NGO representing the schools, the students and their families. The government's defence to this legal challenge was that there were insufficient resources to guarantee access to textbooks for all and that the children could copy their lessons by hand from the blackboard or work from photocopies. The Supreme Court of Appeal in South Africa thought differently, observing that:

Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard, which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against (Minister of Basic Education v. Basic Education for All, 2015, para. 49).

The children, who were manifestly disadvantaged by the lack of textbooks, experienced first-hand violations of their human rights. However, someone involved in this case (perhaps a child, a parent or a teacher) had received sufficient legal education to not only be able to identify this injustice but to classify it as discrimination and seek support to challenge it in the domestic courts. Moreover, the vindication of the children's right to equality in education, and the expression of this in a legal precedent, offers the children and adults involved a further practical lesson in, through and for human rights.

Breaches of children's rights in schools are happening every day across the world. So too are challenges, legal and otherwise, to these violations. The premise of this article is that for HRE to be truly transformative and achieve its main aim, it must address –rather than neglect– such breaches and violations. HRE must incorporate 'negative' lived experiences of injustice, exclusion or discrimination as a way to build children's capacity and develop the legal knowledge and skills that will enable them to identify and challenge breaches of their own rights and the rights of others. We suggest that there is as much, if not more, to be learnt from ongoing violations of human rights obligations in schools, and the responses (or lack of them) to the violation of children's rights as there is from positive descriptions of the scope and

characteristics of an education that respects human/child rights. We take our inspiration, in part, from the work of Professor Katarina Tomasevski, a formidable human rights defender and the first United Nations Special Rapporteur on the Right to Education. She identified the need for a greater focus on the daily realities of children in the schools that they attend, arguing that a lack of attention to ongoing abuses of rights in schools undermines the efforts of HRE:

Without a clear vision of the inter-relationship between the right to education and rights in education, promoting human rights education or human rights through education remains impossible. What happens in schools is seldom examined through the human rights lense (sic) the most important reason being that the notion of rights in education is new. Evidence of abuses of education and in education is not systematically collected and remains largely unknown and facilitates the perpetuation of abuses (Tomasevski 2001, p.43).

If HRE research and practice concentrates on what an education that respects human rights should be, rather than examining what is really happening in many children's lives, it forgoes important learning opportunities for children and has less of a capacity to advance human rights in schools. In view of this, this article focuses on aspects of what we currently know about what should *not* happen in schools, as opposed to what should. Through an analysis of legal sources and previous literature, it provides an overview of some of the ongoing breaches of children's rights in schools. This is followed by a discussion of the role of law and legal knowledge as a means to transform children's lived experiences within and beyond schools into learning opportunities for HRE. Finally, it concludes with a broader discussion of the role of legal scholarship in the research and practice of HRE.

Breaches of children's rights in education

This section identifies some of the core violations of children's rights to and in education within schools. It is not intended – and nor is it possible here – to provide an exhaustive account of all human rights violations in schools. The section that follows provides a 'pen-portrait' of the scale and scope of human rights breaches in formal education, highlighting the fact that in most areas of education children's human rights can be violated, and that these violations can be the result of both systemic injustices as well as the actions of individual state actors. We draw on a number of legal sources: these include the Concluding Observations and General Comments of the Committee on the Rights of the Child, and legal cases where the actions of schools and teachers have been challenged in national and international courts. The latter, in particular, are often neglected in human rights education scholarship (with the landmark case of *Brown v Board of Education* in 1954 as a notable exception), even though they are crucial to understanding the relationship between human rights and education. These legal challenges provide unique insights into actions and omissions that were deemed so unacceptable to the rights-holders that they (or others) were prompted to seek public redress. Each subsection opens with a provision of the UNCRC (how things should be – the relevant human right) before identifying what a breach of that provision looks like in practice (how things are for some children – the breach). What follows is an analysis and synthesis of these

breaches, under the following five themes: access to education; curriculum; testing and assessment; discipline; and respect for children's views.

Access to education

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (Article 2, UNCRC).

Article 2 of the UNCRC, the non-discrimination principle, is not a stand-alone right. It cuts across all other provisions of the Convention, including Article 28, which requires access to full and compulsory primary education and the expansion of secondary and vocational education. Even though the numbers of children attending school globally have steadily increased in the wake of the Millennium Development Goals (Unterhalter, 2014), it is estimated that there are still around 264 million children out of school and the increase in the numbers of children attending school appears to have plateaued (UNESCO, 2017). Although the Sustainable Development Goals have placed an additional focus on quality and equality in the education that children receive, these rights are far from being universally implemented. Even in countries that have achieved universal primary and secondary enrolment, there are always certain groups of children who do not fully attend school. These are often girls, children with disabilities, and national minorities (Lundy, 2012).

The reasons that certain children do not or cannot attend, or do not stay in school, are varied. However, they are often connected to poverty and broader forms of social exclusion. The educational experiences of Roma children in Europe serve as a key example of this and the Committee frequently identifies them as a group that is unjustly excluded (Lundy, 2012). Exclusion and the breach of the right to access to education come in a number of guises, one of which is the hidden or additional costs of supposedly 'free' education. For example, in *Ponomaryovi v. Bulgaria* (2011), the European Court of Human Rights decided that a requirement for Russian nationals who did not have Bulgarian residence permits to pay additional fees in order for their children to access education was discriminatory. It observed that:

'Under Article 28 of the United Nations Convention on the Rights of the Child, the State had the duty to assist children in their drive to become fully fledged members of society. By erecting insuperable obstacles to the completion of their secondary education, the State was preventing them from developing in that way.' (*Ponomaryovi v. Bulgaria*, 2011, para. 46).

Another reason why many migrant children are excluded is that they lack registration documents. This can mean that they miss out on education completely (Todres, 2003) or end up in inferior private arrangements with adverse consequences for equality (Chen and Feng, 2013). The Committee emphasizes, in its concluding observations, the barrier that the lack of registration documents creates. For example, it recently expressed a concern in relation to Cameroon about: 'The

disproportionate impact on indigenous, refugee and asylum-seeking children and children living in remote areas of the requirement to produce a birth certificate to qualify for the secondary school entrance exam' (UN, 2017, para. 38(e)).

Other forms of exclusion that jeopardise the right to access to education occur at the point of entry, with seemingly objective admissions criteria resulting in discriminatory outcomes. Places at schools are social goods and the distribution of these through admissions policies can result in certain groups of children being excluded, directly or indirectly (West, 2006). Research in New Zealand and elsewhere has demonstrated that the drawing of geographical boundaries operates against the most disadvantaged pupils (Lubienski et al, 2013). Academic selection tests and secondary school criteria that prioritise children on the basis of good attendance at a primary school are also questionable since the latter can disadvantage children who have long term illnesses, whose families are nomadic or who are just poor, given the long-established link between poor attendance at primary school and lower socio-economic status. Moreover, an obvious form of exclusion occurs when a child is expelled or temporarily suspended from school as a result of disciplinary mechanisms. Research suggests that these exclusions fall disproportionately on children with special educational needs and children from certain ethnic backgrounds (Morris and Perry, 2016).

Discrimination and segregation are practices that occur within schools that breach the rights of children to a child-friendly and empowering education. In one case in the United States¹, *Antoine et al v. Winner School District* (2007), ten Native American families claimed that the schools in their district discriminated against Native American students in disciplining them, were hostile towards Native American families, and took statements from students involved in disciplinary matters that were later used to prosecute them in juvenile and criminal courts. The case was settled and a set of measures implemented to counteract the indirectly discriminatory effects. The Committee on the Rights of the Child has also been prompt to identify similar patterns of indirect discrimination, recommending for example that the United Kingdom take measures to reduce disparities in the number of black and ethnic minority children excluded from school (UN, 2016). Finally, another form of exclusion occurs when children are taught alone or in separate classes. Segregation of groups of children, such as children with disabilities or children from certain ethnic groups, is, however, problematic from a human rights perspective (Lundy, 2012). In 2010, the European Court of Human Rights considered that the education of Roma children in separate classes was a breach of their right to non-discrimination in education, in spite of Croatia's argument that it was justified because the children did not speak Croatian (*Oršuš and others v. Croatia Application* (2010)).

Curriculum

- "(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;*
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;*
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the*

country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
(e) The development of respect for the natural environment.”
(Article 29(1), UNCRC).

Article 29(1) defines the aims of education in ambitious, even idealistic, terms. It obliges states to provide an education that develops every child to his/her fullest potential, and to teach respect for human rights, cultural identity and the environment. Much of this echoes what is said about the right to education in Article 13 of the International Covenant on Social, Economic and Cultural Rights (1966) and there is little here that most educators would disagree with. Articles 29(1)(c) and (d) expand the aims of education to include an education that deepens respect for the child's own ethnicity, cultural and national identity as well as respect for difference and the promotion of tolerance and gender equality. It is difficult to imagine any country outwardly disagreeing with this vision of education – the world's governments did not when they ratified it with very few reservations (see Lundy et. al., 2016). And yet, monitoring of the UNCRC often highlights how some countries fall short of the curricular standards; for instance, those whose actual stated aims of education are considered to discriminate against girls.

Another breach of children's rights in relation to the aims of education advanced in schools can be found in a curriculum that promotes intolerance towards other cultures, an intolerance that is expressed in the resulting teaching materials and practices. Educational curricula, being the prime opportunity for a government to promote its own national identity, are often directly or indirectly xenophobic; texts written to promote a particular dominant ideology or group convey messages of intolerance or racial superiority as part of the so-called 'hidden curriculum.' Examples can be found in textbooks that only offer images of certain ethnicities and exclude others, or materials that explicitly disseminate and reinforce negative stereotypes (Apple & Christian-Smith, 2017), unless these are employed to encourage critical reflection. For instance, in *Monteiro v. The Tempe Union High School District* (1998), a court did not uphold a request by parents to remove certain texts, including Mark Twain's *Huckleberry Finn*, which used offensive terms to describe African Americans, on the basis that these texts provide a significant opportunity to discuss and critique discriminatory attitudes.

Similarly, in spite of the requirement to promote respect for parents in Article 29, educational curricula can also contain teachings and messages relevant to the promotion of tolerance, equality and children's rights with which some parents disagree. The challenge then is to balance the rights of the child to an effective and fulfilling education with the views of the parents, as well as taking account of the child's concerns and the general public interest (Lundy, 2005). For instance, sometimes the child's right to have certain information should outweigh the parents' right to withdraw them from certain parts of the curriculum. This happened in the Danish Sex Education case in 1976, in which the European Court of Human Rights considered it appropriate for a state to have a system of compulsory sex education

that provided information critically, objectively and pluralistically to children, despite parents' objections.

Complying with parents' legitimate requests for exemptions from the curriculum presents a challenge for schools and educators and has the potential to constitute a breach of children's rights, since the human rights option of choice, such as the withdrawal of the child from the lesson, has the risk of leaving children isolated and stigmatised (Mawhinney, 2012). In a Canadian case, *T. v Hamilton-Wentworth District School Board* (2016), a Greek orthodox parent wanted a child withdrawn from all lessons where there were 'false teachings' (identified as issues such as witchcraft and homosexuality). The court declined the request for withdrawal, observing that isolation was antithetical to the competing legislative mandate and values favouring inclusivity, equality and multiculturalism. It considered that the parents' and child's freedom of conscience should not take precedence over the other Charter values raised by the case, including the school board's duty of neutrality and equality, and the multicultural nature of Canadian society (*T. v Hamilton-Wentworth District School Board* (2016)).

In other instances, particularly in countries that have state-funded faith-based education, a breach of children's human rights will occur where the state is considered to be pursuing a form of indoctrination. However, the European Court of Human Rights (in the case of *Dojan and Others v Germany*, 2011) considered it legitimate for Germany to have a compulsory schooling system 'aimed at educating responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society – in particular, with a view to integrating minorities and avoiding the formation of religiously or ideologically motivated "parallel societies"'. Likewise, in *Board of Education, Island Trees Union Free School District No. 26 et al. v Pico* (1982) a local Board of Education in the United States ordered that certain books, which it deemed 'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,' be removed from high school and junior high libraries. The Court argued that students not only had a right to speak but also to access information, and the right to access information makes school libraries and access to materials in them important for realizing this right.

Testing and assessment

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (Article 3, UNCRC).

Tests and assessment have been largely neglected as a human rights issue, in spite of the fact that they have an important role to play in enabling learning (Elwood and 2010). Nevertheless, when they are asked, children do recognise their value and also the impact that tests and assessment have on their educational experience and overall well-being (Elwood, 2012). Breaches to children's rights can occur at different levels: national policies on educational assessment; school policies and guidelines for testing and evaluating children's learning; teachers' practices, for example in setting. Tomasevski (2006) has suggested that the challenge in many education systems is that testing systems do not always have the child's best interests at their core: rather

they can be used to select between children rather than for the purposes of assessing and recognising learning. She observes that:

'The basic feature of every education system is that it selects the few who make it to the pinnacle of the education pyramid and excludes the many who start at the bottom but do [not] make it all the way up ... failures are necessary because each step upwards the education pyramid accommodates fewer people. To avoid becoming a failure, small people whom we call children have to adapt to what is required of them to move up.' Tomasevski (2006, p. 103).

The focus on tests as ways of selecting who gets to the next stage can have a distorting effect on the education provided and the children's overall learning experience. So, while the problem in some countries is a lack of access to education and proper accreditation of learning, in others education has become so prized that children are put under exorbitant pressure to perform well in public examinations, often very high-stakes ones, with the result that the tests themselves both distort the curriculum and children's thinking skills (Berliner, 2011). Schools are turned into 'exam factories', with adverse consequences for children's mental health and access to leisure. The Committee on the Rights of the Child has criticised countries where this is happening. For example, it has expressed concern that in Japan, the 'highly competitive school environment may contribute to bullying, mental disorders, truancy, drop-out and suicides among children of school-going age' and recommended that the Japanese government review its school and academic system with a view to combining academic excellence with a child-centred approach. (UN, 2010, para. 71-72).

Secondly, tests should not discriminate against certain groups of children. Tests and their assessment are vulnerable to direct and indirect discrimination, and we should be aware of this danger. Teacher grading can be subject to bias, with research indicating that teachers may award lower scores to girls (Elwood, 2005) and to children from certain ethnic backgrounds. The tests themselves can also be constructed in ways that discriminate indirectly. In the landmark case of *DH v Czech Republic* (2006) the European Court of Human Rights found that seemingly objective 'intelligence' tests which were used to determine which children were allocated to special schools for children with learning disabilities, were culturally biased and discriminated against Roma children. The effect of the tests was that 50 per cent of Roma children attended special schools and 50 per cent of children in special schools were Roma, even though the Roma are a small proportion of the overall Czech population. Whether the problem lies with the test, the tester or both, the human rights imperative is to test in a way that does not unfairly discriminate against certain children.

Discipline

(d) States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention (Article 28(1), UNCRC).

School disciplinary policies have long been a source of contention. Across the world, legislation and courts give schools and teachers authority to punish children for behaviour which their parents do not object to, and this inevitably generates resentment and conflict (Global Initiative to End All Corporal Punishment for Children, 2017). One of the areas where human rights issues abound is in the area of school uniform policy, with cases often founded on arguments related to freedom of expression or religious freedom (Lundy, 2005). There have been many claims of discrimination in relation to the wearing of religious symbols with some countries, such as France, taking a strictly secular approach and others, such as the UK, allowing students to wear religious dress and then finding themselves challenged about the boundaries and limitations of their approach (Lundy, 2005). However, even states that have taken a secular approach need to find ways of accommodating freedom of conscience. In *Singh v. France* (2012), the Human Rights Committee found that the State had not provided compelling evidence that the wearing of the *keski* (a small turban) by a Sikh pupil posed a threat to the rights and freedoms of other pupils. The Committee also found that the permanent expulsion of Mr. Singh from public school was disproportionate to the stated aims, namely the need to respect the religious freedom and the physical safety of pupils in state schools. Likewise, in *Sumayyah Mohammed v. Moraine and Another* (1995), the High Court of Trinidad and Tobago found that the refusal to let a female pupil wear her *jilbab* was discriminatory and unreasonable. States are afforded a high degree of freedom as to their uniform policies. However, they have to show good reason to justify any restrictions on freedom of conscience or expression.

The second area that leaves scope for human rights abuse is the nature of the actual punishment itself. Education must also be provided in a way that respects the strict limits on discipline reflected in article 28 (2) and promotes non-violence in school. It is clear from a human rights perspective that schools should never use physical punishment and most countries have banned it in law. However, it is apparent that many continue to use it in practice (Malak et. al., 2015; Sawhney, 2018). The Committee is absolutely clear that the use of corporal punishment does not respect the inherent dignity of the child. Its list of things that a school should not do, because they are ‘invariably degrading’, is as follows:

“Smacking”, “slapping”, “spanking” children, with the hand or with an implement –a whip, stick, belt, shoe, wooden spoon, etc. ... kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, caning, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion’.
(UN, 2008, para.24)

Corporal punishment is not the only type of punishment that can amount to a breach of children’s human rights in schools. For example, in the case of the *Chief Executive Officer for Education v. Gibbons* (2013) a teacher in Fiji ordered a 10-year-old boy to strip to his underwear in front of the class because he had been talking when asked to stay quiet. The court said:

I further hold that the child felt shameful and that he was attacked physically and mentally. His dignity was interfered with. He felt how he felt because he realised that the treatment that he received was

not at all proper but degrading. It is further inhumane to treat a child with an intention to embarrass the child. I hold that there was a breach of Article 37(a) of the CRC. (Chief Executive Officer for Education v. Gibbons, 2013, para. 59)

Respect for children's views

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (Article 12, UNCRC).

This article is one of the most cited and least understood of the provisions of the UNCRC. Its import is often lost in abbreviated formulations such as 'the voice of the child'; such an expression fails to capture the full extent of the obligation. (Lundy, 2007). It provides children with an additional right that adults do not have in human rights law - the right to have their views given due weight. The right exists in recognition of the power imbalance between children and adult decision-makers and thus children's restricted opportunities for self-determination. It is also a crucial provision, 'the cornerstone' of the Convention (Freeman, 2000). It makes possible the realisation of other rights; it is a 'passport' to the realisation of those rights. If we ignore children's views on their education, we undermine the more general realisation of their rights in school (Lundy, 2007; Osler, 2010).

In much of the related educational research, the focus is on collective participation in decision-making and, in particular, the role and value of school councils. While there are many genuine attempts to create spaces for democratic participation in schools, research indicates that these fora are not always representative (Wyness, 2009) and that children are frustrated when the school council is just a small number of students discussing a restricted set of issues and nothing is changed (Alderson, 2000). Lewars has observed the consequences of a tokenistic student voice: '... disaffected, cynical students; ineffectual processes; and a genuine lack of many of the potential benefits of successful participation' (2009, 271).

Children's right to participate in decision-making that affects them as individuals receives much less attention, in spite of its arguably greater significance (Cantwell, 2011). Every day, decisions are made for children without their input – they are excluded and ignored in clear breach of their international human rights (Harris, 2009). Children with disabilities experience a double disadvantage here, in spite of an extended version of the right to be heard - one that omits any reference to capacity, as set out in the UN Convention on the Rights of Persons with Disabilities (Byrne, 2012). The decisions from which children are excluded are many and various. They include decisions about the school they get to attend, the subjects they study, the examinations they sit, the special educational provision they receive and the disciplinary measures to which they are subjected. The latter two are particularly

significant in the light of the often-neglected second paragraph of Article 12 (i.e. the child's right to be heard in judicial and administrative proceedings). Moreover, even when the most crucial decisions about their education are being taken (e.g. expulsion), children can be denied an independent right to be heard until they are 18 and thus no longer children (Harris, 2009). Schools and educational administrators continue to deny children an opportunity to be heard and to influence these crucial decisions, a fact that strikes at the heart of a rights-respecting education (Lundy et. al., 2016).

The role of law and legal knowledge

The discourse around children's rights is often a rosy one, focused on positive images of protecting children from harm, enabling their development and empowering them. Sloth Nielsen (1996) has described this as a 'chicken-soup' approach to children's rights, suggesting that children's rights are commonly presented as uncontentious while, in reality, just like other human rights, they are sources of conflict and tension. This approach to children's rights is found in several HRE models and programmes, including the *World Programme for Human Rights Education* (2005-ongoing), to which 51 countries now subscribe. In this programme, the emphasis is placed on children learning human rights not only from content transmission but also from experience: it is stated that HR should be 'practised at all levels of the school system' (para. 16) through the curriculum, educational process, pedagogical methods and learning environments. Yet, the capacity to identify and handle human rights abuses in schools is given less attention within HRE curricula than the development of knowledge of the principles of universality, indivisibility, and interdependence or the theories underlying HRE. Furthermore, the knowledge of legal mechanisms proposed does not take into consideration or address as a relevant starting point the reality of human rights breaches and violations, in general, and those affecting children within schools, in particular (UN, 2005).

The 'chicken-soup' approach to children's rights is not only present in programmes and policies, but also in the implementation process and widespread HRE practices. Human rights educators working with children may emphasise the ethical and moral aspects of children's rights over the legal components, presenting these rights as 'ethical values' or a 'lifestyle', rather than legal entitlements that should have concrete legal consequences. In fact, despite the existence of legally binding instruments, such as the UNCRC, it is common for educators to present rights as something 'much more than a law' (Hammond, 2016; Karaman Kepenekci, 2005; Martínez Sainz, 2018a).

However, adherence to a body of safe human rights 'values' can dissipate as soon as it emerges that children's rights clash with the rights of others (such as their parents) or cost money or promote their self-autonomy (Lundy, 2007). Yet, it is a reality that such clashes and breaches are both the *raison d'être* and the undeniable messy reality of human rights. Certainly, international human rights standards are intended to promote positive approaches to the treatment of children – these child-centred definitions emphasise respect, dignity, equality and tolerance. Equally, and arguably more importantly, they exist to expose breaches of those standards and to enable states to be held to account for their actions. Human rights standards define the limits of tolerable behaviour by the government and its agents towards citizens (including children) but in doing so, expose the intolerable and unacceptable (Shue, 2006).

The Committee and others emphasise the learning that comes from seeing human rights valued and embodied in the children's lived experiences in schools: 'children should also learn about human rights by seeing human rights standards implemented in practice, whether at home, in school, or within the community. Human rights education should be a comprehensive, life-long process, and start with the reflection of human rights values in the daily life and experiences of children' (UN, 2001, para 15). However, as discussed above, many children's school lives do not provide them with a real opportunity to witness these values and, indeed, the ideal of the so-called 3 'Ps' of children's rights – provision, protection, participation (for a critique of these, see Quennerstedt, 2010). Their 'lived experiences' of injustice, exclusion or discrimination should not be disregarded as less valuable for the overall purpose of learning about their rights. On the contrary, these should be addressed as key opportunities for children to develop the legal knowledge required to identify, handle, and act on violations and breaches of their rights within and beyond school.

Rather than enjoying educational provision, many children are excluded unjustly, often on the basis of their gender, race, and disability or just by virtue of being poor. Rather than providing protection, for many children school is a place where they are beaten, abused, bullied or attacked. And instead of participating, children are often ignored, silenced, censored and restricted. Thus, if we are to fully understand what an education that respects human rights is and how HRE can effectively 'promote the inclusion and practice of human rights in the primary and secondary school systems' (UN, 2005, para. 21), we need to engage with the dark side of human rights breaches as well as the positive, aspirational vision that a human rights framework offers.

The most egregious breaches of children's rights in education receive steady attention, since they are often the focus of successful funding campaigns by international charities attempting to deliver education in the context of war, forced migration and extreme poverty. However, in schools more generally, it appears less acceptable to identify and label injustices and inequities as breaches of children's human rights. The reason why there is such discomfort here merits further research but it is undoubtedly connected, at least in part, to concerns about teacher authority and the perceived risks of empowering schoolchildren (Howe and Covell, 2005; Lundy, 2007; Struthers, 2016). Rather, it seems that safer, positive concepts such as democracy, tolerance, and respect for diversity are the acceptable face of human rights in many instances. Yet, part of the significance of HRE is precisely that it takes into consideration challenges and barriers for the enjoyment of rights as well as the empowerment –through knowledge and skills– to exercise them. Human rights law and legal knowledge is essential for such empowerment and for the fulfilment of one of the main aims of HRE, stated in the *United Nations Declaration on Human Rights Education and Training* (2012): to contribute 'to the prevention of human rights violations and abuses and to the combating and eradication of all forms of discrimination, racism, stereotyping and incitement to hatred, and the harmful attitudes and prejudices that underlie them' (Article 4, UN, 2012).

Legal literacy for a transformative HRE

A key distinction of transformative HRE, in comparison with other approaches to teaching and learning about, through and for rights, is that it 'exposes learners to gaps between rights and actual realities, and provokes group dialogue on the concrete actions necessary to close these gaps' (Bajaj et al, 2016). The aim is to bring

rights to life, address their violations and foster their protection and promotion through individual and collective action. Thus, the legal knowledge required to achieve this aim goes beyond an awareness of the local and international instruments of human rights. A truly transformative HRE approach requires a legal literacy from individuals and communities, so that they are capable of understanding the law and its relevant instruments, as well as the possible legal pathways to take. Only legally-literate individuals and communities will have the capacity to transform breaches and violations of rights – including children’s rights in education – into actionable principles for their protection.

Legal knowledge has a transformative power within HRE, not only as a first step to reach further levels of commitment and engagement towards rights, but as a transversal element. Thus, in these inaugural issues of the Human Rights Education Review, it is worth asking why legal literacy is often disregarded within HRE. Taking into consideration the many and various breaches of children’s rights within schools outlined earlier, legal literacy for children should be considered an essential and central element for an effective and transformative implementation of HRE. Injustice, discrimination and exclusion are already part of children’s lived experiences; thus, rather than neglecting the breaches of children’s rights, HRE should use them as learning opportunities to teach children about law. Children must become legally literate and develop the legal knowledge and skills necessary to identify breaches of rights, recognise them as such and, where appropriate, seek legal means to enforce them.

We would respectfully suggest that there is still a chasm of understanding between legal scholarship and HRE – one that needs to be bridged if we are to advance theory and practice in both. On the one hand, there seems to be a lack of discussion of the legal scholarship and jurisprudence of children’s rights within HRE literature –both theoretical and empirical studies. Some leading HRE scholars have acknowledged the significant value of law as ‘part of the struggle for justice’ dismissing the suggestion that legal approaches are unhelpful or a ‘diversion’ (Osler, 2010, p. 121), or stated that ‘international standards such as the UDHR provide ‘a language for naming discriminations and abuses of human dignity’ (Starkey, 2010, p. 39). However, even transformative models for HRE (Bajaj et al, 2016; Tibbitts, 2017) do not always credit the law, legally binding instruments such as the UNCRC, and legal literacy as necessary conditions for the transformative, emancipatory and critical learning required for the prevention and elimination of human rights violations. On the other hand, few academic human rights lawyers research HRE (for exceptions see the work of Struthers (2016) and Coysh (2017)). For legal scholars, a major focus of study is whether human rights, particularly social and economic rights such as education, have been effectively translated into domestic law and rendered justiciable (e.g. Whelan and Donnelly, 2007) or how education rights are being implemented in practice (e.g. Lundy, 2012).

Those who study or promote HRE have a range of choices; they can situate their understanding of human rights in a broader field of moral or political philosophy or they can focus on international human rights law or, indeed, they can draw on both. However, if international human rights **law** is in the mix (as it usually is), then human rights educators and scholars need to engage with it. Legal literacy becomes necessary not only for children but also for educators, academics and practitioners in order to understand, accurately refer to and use legal instruments. Such literacy will also enable them to distinguish between important human rights

facts including, for example, the difference between the incorporation of rights in law and their implementation in practice.

Legally literate HRE would also promote awareness of a primary purpose of these international standards, which is to achieve state accountability for the way governments treat their citizens and to enable rights-holders, including children, to claim their rights and use the legal standards, where appropriate, as a basis to seek redress for wrongs. It is widely accepted that it is insufficient to teach children to memorise a set of articles in an international treaty. However, HRE that concentrates on learning about values such as democracy, tolerance and equality while leaving rights-holders unable to identify a breach of their own rights and when and how to challenge instances when the state's actions fall short of its legal commitments is, frankly, equally unacceptable. The importance of acknowledging children's lived experiences – including breaches of their rights – in HRE practice has been demonstrated (Martínez Sainz, 2018b). However narratives of injustice, discrimination and exclusion only get you so far in securing children's rights; these narratives highlight and identify the problem but do not necessarily mean that children can identify an actual violation of their rights, let alone know what legal actions they can take to secure them. Children have a right to know what their schools and others should not be doing to them, as well as what they should, and human rights education is one place to help to ensure that this occurs.

In summary, we suggest that informing and enabling children to challenge breaches of their rights in schools should be an essential part of a transformative human rights education. Yet, we acknowledge that a major part of the reason why it occurs so infrequently in practice is connected to a legitimate fear that this will be disruptive to education itself. In this sense, the implications of emphasising the potential of law for addressing human rights violations are not neutral; on the contrary, the approach is radical and will inevitably entail some degree of risk, even to the very rights for which children are attempting to seek redress. However, that is arguably the point - giving children the legal knowledge and tools to address breaches and violations of their rights wherever they arise is not just a right itself but a seemingly undervalued way of educating them in human rights for transformation.

Conclusion

Martin Luther King famously said that, in the struggle for justice, it is not law or education, it is law **and** education. So too in relation to HRE. We need to 'harness both the normative and enforcing capacity of law and the persuasive potential of education' (McEvoy and Lundy (2007), 513). Human rights educators, practitioners, and scholars often point out that there can be no enjoyment of rights without rights-holders having knowledge of them. In a similar vein, one of the first things that lawyers learn is the principle '*ubi jus ibi remedium*' ('for every wrong, the law provides a remedy' or, sometimes, 'no rights without redress'). Lawyers, both academics and practitioners, are trained to look for injustices and to call on agreed bodies of norms to understand where these occur and how to base their claims for justice and change. The gaze of the lawyer and the legal academic is mainly on the negative – when things go wrong. Yet children are taught about human rights without necessarily learning what counts as a breach of those rights in the very context in which they are learning. They may be acquiring important knowledge, skills and values that they can use to attempt to effect change in their own lives and

lives of others, but it can be questioned whether an education that does that without equipping them with precise legal knowledge that enables them to identify and challenge violations truly counts as HRE. In any event, their human rights learning is undoubtedly impoverished.

Until recently, UNICEF published a popular guide to the UNCRC called '*The Little Book of Rights and Responsibilities*'. The booklet implied that the enjoyment of certain rights was contingent upon children behaving in certain ways and was thus problematic from a human rights legal perspective. However, echoes of this type of misunderstanding of the nature of human rights persist (Howe and Covell, 2010). A good replacement would be a book called the '*Little Book of Rights, Wrongs and What to Do About Them*'. This would, for example, tell children that they have a right to be safe in school –and certainly a responsibility to respect the rights of others– but that they have the capacity to do something when it does not happen. It would point out that this means that they should not be beaten, bullied or humiliated by their teachers or classmates and, if this were to happen, what they could do in order to make sure it stops. That would be a truly transformative HRE, capable of preventing human rights violations and eradicating all forms of discrimination and empowering individuals and communities at once.

An increased focus on legal literacy for children so they can effectively learn what counts as a human rights wrong would be timely. The UN Committee on the Rights of the Child has chosen to focus on the topic of child human rights defenders in its 2018 day of general discussion. Human rights defenders are currently a major focus of interest in the international human rights community; and enabling and protecting them is a pressing issue in a global context of shrinking democratic space (Orr et. al., 2016). However, children are rarely referred to as human rights defenders or even activists. Instead, the lexicon is dominated by references to civic engagement and action. This may do children a disservice. Children are human rights-holders, human rights victims and human rights defenders, with Malala Yousafzai as an exceptional yet by no means unique example. Right across the globe, children are observing and experiencing manifest injustices in their own lives and the lives of others in schools and elsewhere and are working, often in some danger, for change (Orr et. al., 2016). If human rights and HRE are to be effective, rights-holders, including children, must be enabled in schools and through their lived experiences in formal education to see, classify and respond to violations for what they are – breaches of their legally guaranteed international human rights.

Notes

¹ Note that the United States has failed to ratify the UN Convention on the Rights of the Child, despite signing it in 1995.

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